United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1448

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-v-

SUSAN BRAUNIG,

Appellant

----------x

Docket No.
76-1448

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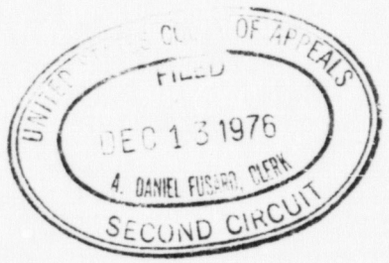
P/S

BRIEF FOR APPELLANT SUSAN BRAUNIG

Appeal from a Judgment of
Conviction In The United
States District Court For
The Southern District of
New York



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UNITED STATES OF AMERICA,

Appellee,

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-v-

SUSAN BRAUNIG,

Appellant.

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BRIEF FOR APPELLANT SUSAN BRAUNIG

Susan Braunig appeals from her conviction on October 26, 1976 in the United States District Court for the Southern District of New York (Pierce, J.) upon a jury verdict of passing two forged checks (an alleged mail fraud), using a fictitious name and grand jury perjury. 18 U.S.C. 1341, 1342, 1623. She received a two year concurrent sentence on each of four counts. Counsel on this appeal is assigned under the C.J.A.

The indictment, 76 CR 21, was against her, Michael Gardner and Sy Guthrie. Gardner and Guthrie were tried separately earlier this year. A jury convicted Gardner on the forged checks and fictitious name counts and several other mail fraud schemes also charged against Braunig but not tried, and eventually dismissed with the Government's consent.

This Court affirmed Gardner's conviction and his five year sentence thereon without opinion. 76-1339, October 22, 1976. His petition for certiorari to the Supreme Court is pending. No. 76-5727. Guthrie was acquitted in the earlier trial but still faces a perjury count.

ISSUES PRESENTED FOR REVIEW

With the exception of issue (4), which we raise but do not discuss in order to keep it alive during Gardner's certiorari petition, none of the issues here was involved in the Gardner trial or appeal. The issues are:

1. Whether the district court erred in denying Braunig's motion to suppress evidence seized in a warrantless search of an apartment she shared with Gardner? Braunig and Gardner were both in jail at the time. Agent Myers made the search while the landlady was executing an eviction order, and allegedly with her consent. The eviction upon which the consent rested, however, was invalid because the landlady obtained the order without actual notice to Braunig or Gardner when she either knew or could have known where to locate them. There is a further issue arising out of Myers' participation in the landlady's withholding notice of the eviction from Braunig and Gardner.

2. Whether the district court erred in denying a hearing on the suppression motion, particularly after learning that the Government had withheld (in violation of Brady v.

v. Maryland) that Agent Myers was under investigation for illegal break-ins?

3. Whether the district court erred in permitting the Government to prove as a similar act that Gardner had defrauded an upstate bank of $50,000 when there was no connection between that crime and Braunig?

4. Whether in light of United States v. Maze, 414 U.S. 395 (1974) the Government proved a violation of the mail fraud statute arising out of the presentation to Barclays Bank of allegedly forged checks?

STATEMENT OF FACTS

There were four charges in Braunig's trial. The jury convicted her on the first three and acquitted her on the last. Sufficiency is not at issue so we state only the outlines.

Barclays Bank (Counts 5 and 6)

The indictment alleged, and an FBI handwriting expert testified, that Gardner forged the drawer's signature on two checks in December 1974 to Braunig's order. One was drawn on Metro Trust in Toronto for $4,875 and bore the signature John Robert Barry; the second on Metro Trust in Montreal for $4,931.09 with the signature David Barnett (or Barrett) (A 14-15).*

Braunig deposited the checks in her Barclays Bank account in New York. Barclays ordinarily takes foreign checks for collection only. In this case it treated the checks as domestic out of town checks and permitted Braunig to draw on them after seven business days (149-51, 157-58). A few weeks later Metro Trust returned the checks to Barclays as drawn on unknown accounts (159-60, 216-17). Braunig, however, refused to make up the $9,797.01 by which her Barclays account was now overdrawn (160-61).

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* The Appendix indictment is the redacted one on which Braunig went to trial maintaining, however, the count numbering from original 76 Cr 21. Numbered references in this Brief unless otherwise specified are to the trial transcript (Tr.). GX refers to the Government's trial exhibits and A to the Appendix to this Brief.

Braunig's participation in negotiating the forgeries was charged as mail fraud. 18 U.S.C. 1341. The district court rejected the contention that the statute did not apply because the mailing was only incidental (A 145). United States v. Maze, 414 U.S. 395 (1974).

Charge Account and Credit Cards (Count 13)

In 1972 and 1973 Braunig opened several charge accounts, allegedly giving false information about the nature of her employment and her salary. She then used the name Susan M. Gardner or S. M. Gardner and changed the name on the accounts accordingly. Gardner also used "S.M. Gardner", and with that name ran up bills with Braunig in late 1973 and 1974 which they could not pay.*

The indictment charged that there was no intent to pay the bills and that Braunig's change to the Gardner name was intended to obtain credit falsely, violating the fictitious name statute (A 13, 17). 18 U.S.C. 1342.

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* The various account records showed repeated payments in 1972, 1973 and part of 1974 and delinquencies only when Gardner was financially in extremis thereafter. The Government urged that the early payments were only to lull the stores into a false sense of security (1064). The jury also rejected other proof that Braunig used the name Gardner because she was in love with him and wanted recognition as his wife (e.g., 985, 1038).

Perjury (Count 15)

In May and June 1975 Braunig testified before the grand jury. The Government charged, and apparently proved to the jury's satisfaction that some or all of these statements were false: that Braunig changed her name to S.M. Gardner by registering it with Actors Equity Association to pursue her acting career (673); that she opened an "S.M. Gardner" account at Manufacturers Hanover Trust because a bank officer suggested it (684); that the only S. M. Gardner bank account was at Manufacturers Hanover (686); that she never told Manufacturers Hanover she was married to Gardner (684); and that she was never "partners" with Gardner in any venture (691).

The jury, however, acquitted on the Fun Tyme counts (Counts 7 and 8) charging that Gardner and Guthrie (with Braunig's participation later on) obtained an advance financing fee from a travel agency without legitimate expectation that they could obtain the financing on the terms and conditions promised (A 16).

The Apartment Search

On May 25, 1976 the jury was deliberating at Gardner's trial (A 86). The Government searched Apartment 10A at 530 E. 72nd Street without a warrant and seized several shopping bags (881) of documents and personal letters and files (882) which the Agent found in desk drawers and

cabinets (876, 879). Many were in evidence, were heavily relied on to urge and to obtain conviction, and even played a major role in the district court's determination to impose a substantial jail sentence (1288).* Allegedly the seizure was with the landlady's consent but that tells only a small part of the story. The rest is as follows.

In September 1972 Braunig, an actress by profession (984), went to work as Gal Friday in Gardner's office (16). He was married, with three children and had already been in substantial trouble with the Government for various frauds and swindles.

Braunig fell desperately in love with him (986, A 126) (he was not without considerable personal attractiveness and charm), and soon was holding herself out as his wife (981-82). After that they lived together, first at 321 East 69th Street in Manhattan and then in Apartment 10A, 530 East 72nd Street. They sublet the apartment from Kathleen Flanagan as Mr. and Mrs. Gardner (A 83).

In May 1975 the Government indicted Gardner in this case (819-20). That served as the occasion for his remand on another conviction. From then until now he has been in federal prison (A 83). In July 1975 the Government filed a superseding

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* This was a personal letter (GX 531, A 126) from Braunig to Gardner in which she stated: "We have now become 'partners-in-crime' and learned to enjoy it."

indictment adding Braunig and Guthrie as defendants.* Braunig was arrested and released on bail. While awaiting trial she went to Montreal and was arrested there on check-kiting charges. She was in jail in Montreal from March to July 1976 (A 84, 1289). She was then delivered to federal confinement where she also has been ever since.

With both Braunig and Gardner in custody, the apartment rent was not paid. Mrs. Flanagan commenced an eviction action.** The petition was nailed and mailed at the apartment itself so that neither Braunig (who was in a Montreal jail) nor Gardner (who was at the MCC here and in the midst of his own trial) knew that the action was pending (A 84). The Government did. FBI Agent Myers, who headed the Gardner investigation and was present throughout the Gardner trial as the case agent, spoke repeatedly with Mrs. Flanagan and her lawyer and knew the status of the eviction (A 84, 93). He knew, moreover, that Mrs. Flanagan had not given notice of the eviction to Braunig and Gardner and that they did not even know about the eviction.

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* The eventual trials were on yet a third superseding indictment (A 1).

** This was the second such action. Braunig had avoided execution on an earlier eviction by bringing the rent up to date (A 83-84).

By May 25, 1976 Mrs. Flanagan had a default judgment of eviction. She went that day to Apartment 10A with the City Marshal (A94). The jury was then deliberating in Gardner's trial. Myers was forewarned of the eviction and was present also (A 84). He searched the apartment, including looking into desk and file drawers and cabinets (873) and then with Mrs. Flanagan's permission carried off the papers in question. The Government later prepared a twenty page inventory showing 287 different groupings of items, excerpts of which are at A 138-44. A few days later Mrs. Flanagan also delivered Braunig's personal diary to the Agent (A 84-85).

The District Court Opinion

Prior to trial Braunig moved to suppress the evidence obtained at the apartment search. The Government countered at an August 12, 1976 conference with an oral statement setting forth the eviction proceeding and Mrs. Flanagan's permission to take the material (A 91). The Government knew (A 119) but did not disclose that Agent Myers was then under investigation by the Department of Justice for illegal break-ins (A 118).

The district court denied Braunig's motion without a hearing (A 82). The governing consideration, it held, was that since Gardner and Braunig were both in jail they could have had no reasonable expectation that their apartment would remain

secure from lawful eviction, entry and search (A 86). The Flanagan eviction, therefore, and the consent to search which followed, invaded no privacy right guaranteed by the Fourth Amendment (A 87-89). It made no difference in these circumstances that they received no notice of the eviction or that Myers, the Gardner case agent, deliberately bypassed obtaining a warrant from the very court which was then in the process of conducting the Gardner trial (A 90).

Following that ruling and in anticipation of Myers trial testimony about the apartment seizure, the Government disclosed the Myers break-ins to the court (8-9, A 116). The court ruled that the information was Brady material and directed its disclosure to the defense (A 116-17). Braunig moved to reopen the search issue and for a hearing (A 118-20). The motion had been denied based on Myers actions and at the very least he ought be cross-examined in light of the Brady disclosure.

The district court denied that request (A 121, 125). It reiterated that the Flanagan eviction and consent were the crucial facts in its holding and that the Brady disclosure did not change those (A 125). To insure that there had been no prior break-ins by Myers into the apartment it asked for and received an affidavit from him that no such break-ins had taken place (A123-24; 844).

Bank of Albany Similar Act

Two items Myers seized from a desk drawer in the apartment (144) were a certification stamp of the State Bank of Albany together with a stamp pad (GX 456 A, B) and a blank Bank of Albany checkbook for an Eric Thomas account (GX 455; Tr. 868A). The Government advised that Gardner admitted in a California trial that in 1973 he had forged two $25,000 Eric Thomas checks, fraudulently certified them with the stamp, and shared in the proceeds of the checks (A 101-02). The Government introduced the stamp, stamp pad and checkbook as well as the two Eric Thomas forgeries into evidence at Braunig's trial (GX 353, 354; Tr. 761). A bank official testified that the Bank had not certified the checks (762) and that the real bank certification stamp had not left its possession (763). An FBI expert confirmed that the Gardner stamp rather than a genuine certification had been used on the two Thomas checks (782-83).

The district court permitted the jury to consider the Bank of Albany scheme as similar act evidence hearing on Braunig's knowledge and intent (A 108-09, 114).* However, except for the stamp and blank checkbook being found in a desk drawer of the apartment she shared with Gardner, there was no connection whatsoever between the scheme and Braunig.

* Although the Government did not have Gardner's California admissions before the jury, the Bank of Albany records in evidence showed that the two checks were phony (GX 352; Tr. 760) so that the jury had the full import of the scheme. Although the scheme was closest to passing forged checks at Barclays Bank (Counts 5 and 6) there was no instruction limiting the jury's consideration to those counts (A 57-59).

ARGUMENT

POINT I

MRS. FLANAGAN'S ORDER OF EVICTION FAILED TO COMPLY WITH DUE PROCESS REQUIREMENTS. THE CONSENT SEARCH BASED ON THAT ORDER VIOLATED DEFENDANT'S RIGHTS.

Several motel cases in this and other circuits hold that the occupant cannot complain if the proprietor consents to a search after the term has ended (A 88). United States v. Perizo, 514 F.2d 52 (2d Cir. 1975); United States v. Cowan, 396 F.2d 83 (2d Cir. 1967); United States v. Croft, 429 F.2d 884 (10th Cir. 1970). This Court, moreover, intimated the same position when the landlord consented to a search after an eviction, although in that case there was an abandonment of the premises and the Court's view was dictum only since the search was held unlawful. United States v. Paroutian, 299 F.2d 486, 488 (2d Cir. 1962).

Those cases do not apply here.

The inquiry must start with whether Mrs. Flanagan had a right to be on the premises. The crucial point to the district court's view that the search was legal was that the eviction was also legal. Its opinion referred again and again to "a lawful order of eviction following lawful notice to the tenant" (A 86, emphasis supplied; A 87 (same); A 88 (same);

A 89 ("landlady . . . was in lawful possession of the premises"); A 90 (Same)). Undoubtedly it would have rejected Myers' right to rummage through the premises if Mrs. Flanagan had not had an eviction order it believed was lawful. United States v. Botelho, 360 F.Supp. 620 (D. Hawaii 1973) (search unlawful where landlady failed to give written notice of termination as state law required and failed to obtain eviction order from the state courts); Chapman v. United States, 365 U.S. 610, 616 (1961) (search unlawful where Georgia law gave landlord no "right forcibly to enter the demised premises without the consent of the tenant 'to view waste'"); Stoner v. California, 367 U.S. 483 (search unlawful inter alia where hotel proprietor had no authority under California law to authorize search of guests' rooms).*

The fact is that the eviction was not lawful. The notice failed to satisfy clearly recognized due process requirements. Technically Mrs. Flanagan complied with the statute (RPAPL 735). Her process server tried to find someone at the

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* The district court thought Botelho did not apply but that was because it believed the eviction here was lawful whereas the landlady there had no legal basis to be on the premises (A 88-89). Botelho is clearly rig on the point involved. Chapman v. United States, supra; Stoner v. California, supra; 1967 Washington University L.Q. 12, 13 (1967) ("the Supreme Court decisions seem to give support to the rule which has long been generally accepted; that is, one who does not have rights of possession and control in the premises searched cannot validly consent"). See also, United States v. Parcutian, supra.

apartment. When he couldn't, he left the petition on the door and mailed a copy to Gardner and Braunig at that address. Although prior to 1971 he would have been required to attempt first to locate Braunig or Gardner to make personal service, an amendment of that year gave him the immediate option of "suitable age and discretion" service; and the legislature was not constitutionally mandated to maintain the personal service priority requirement which obtained before 1971. Velazquez v. Thompson, 451 F.2d 202 (2d Cir. 1971), affirming 321 F.Supp. 34 (S.D.N.Y. 1970).

The problem is that the landlady knew that Gardner and Braunig were not at the apartment. The only possible consequence therefore of following the statutory procedure was to deprive them of actual notice. More than that their location was readily ascertainable. Myers knew where they were and he and the landlady had been continually talking (A 93).*

* Flanagan served the eviction notice on April 21 and 22. Gardner was then at the MCC because his trial (with Myers as the case agent) was scheduled to and did start April 26. Braunig was in a Montreal jail, as the Government knew, because (a) it had been involved in negotiations with the Canadian authorities to bring her back for the April 26 trial; (b) when that failed it was a party to arrangements to take her deposition for defendant's case in Canada on May 2; and (c) it presented at the Gardner trial the testimony of the Canadian police officer who arrested Braunig in Montreal and was handling her case there.

We do not exclude that Myers told Flanagan where Braunig and Gardner were, and that she was responsible for not reaching them. That slight change in the facts makes no difference to the argument we urge here.

We note finally that had a hearing been held, Braunig or Gardner would have testified to attempts to reach the landlady through intermediaries. She avoided such contacts probably on advice from her attorneys that it might delay the eviction.

Conspicuous service could not be used under these circumstances. The reason is obvious. Notice and an opportunity to be heard are fundamental to due process. Mullane v. Central Hanover Trust Co., 339 U.S. 307 (1950). The landlady's actions insured that there would be no notice. Even a statute constitutional on its face cannot be used to validate a deliberate and calculated action to deprive defendants of notice.*

Covey v. Town of Somers, 351 U.S. 141 (1956) controls. The action was to foreclose a tax lien on property of Nora Brainard. The town followed the statutory p ocedure -- notice by mail, by posting and by publicatio -- and the procedure itself was not constitutionally defective. Brainard, however, was incompetent, and the Town Officials knew it. Under those circumstances, held the Supreme Court, "compliance with the statute

* Velazquez v. Thompson, supra, held that section 735 was constitutional, but excluded the facts here from its reasoning (451 F.2d at 205):

> "It is to be noted initially that since this is an action to recover the possession of premises occupied by the person who is resisting removal, his whereabouts are obviously fixed and easily determinable. Thus the usual problem of serving a person whose present residence is unknown, which gives rise to much of the constitutional litigation in this case . . . is absent."

would not afford notice to the incompetent" (351 U.S. at 147), her Fourteenth Amendment rights were violated, and the foreclosure would have to be set aside. See also Republique Francaise v. Cellosilk Mfg. Co., 309 N.Y. 269, 279 (1955):

> "where a plaintiff has been given alternative methods for the service of process and notices upon his adversary, 'the complainant is under a constitutional duty to select that alternative that is reasonably calculated to notify the adverse party. Stated negatively, the complainant may not select an alternative that he knows (or should know) will not notify the other party when he also knows (or should know) that one of the other alternatives, if selected, would notify the adverse party.'"

Dobkin v. Chapman, 21 N.Y.2d 490 (1968) upholding challenges to various forms of service authorized by CPLR 308(5) but only after examining "the reasonableness of the plaintiff's efforts under all the circumstances to inform the defendant." 21 N.Y. 2d at 503-04. 60 West 109th St. Corp. v. Taylor, 95 N.Y.S.2d 763 (Mun. Ct. 1950). The court invalidated conspicious service because plaintiff could easily have ascertained defendants' actual location and didn't. Although the case was decided under the CPA section first requiring an attempt at personal service, the court, stressing that the landlord knew the tenant could not be reached at the leased premises, expressed fundamental distaste for service made only at such premises. F. & P. Management Co. v. Bergere, 222 N.Y.S. 2d 962 (Mun. Ct. 1961) (landlord knew that tenant was in Paris and that communications should be sent to her there; court invalidates conspicious service of the petition at the leased premises).

Our demonstration that the eviction was invalid ought to end the matter.* We mention however two other factors which also bear on the discussion.

Even if Mrs. Flanagan had a right to retake possession of the apartment, she had no right to the personal property found there. If Gardner or Braunig or their representative had been present, they alone could have taken the personal property and anyone interfering with them would have been liable for conversion. Only in their absence could the City Marshal secure the personal property and turn it over to the Sanitation Department for warehouse storage. Congregation Anshe Sefard v. Title Guarantee & Trust Co., 291 N.Y. 35 (1943); Lewis v. Ocean Navigation & Pier Co., 125 N.Y. 341 (1891); Wilk Enterprises, Inc. v. J.I.B. Realty Corp., 72 Misc.2d 507 (Civ. Ct. 1972); 667 East 187th Street Corp. v. Lindsay, 283 N.Y.S. 2d 199 (Sup. Ct. 1967).

Myers' actions helped bring about disregard of state law. His repeated communications with Flanagan made him practically a participant in the eviction proceedings to the point that when Mrs. Flanagan found Braunig's diary later on, she

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* If "reasonable expectation" must be considered (A 85), certainly neither Braunig nor Gardner could "reasonably expect" that their landlady would evict them without actual notice and in violation of due process standards.

delivered it directly to him (A 95, 90). Myers knew that there had been no notice to Gardner and Braunig. As best as we can tell, he did not inform Flanagan of their whereabouts. In this manner he insured that no representative of defendants would be present at the eviction and insured his freedom to walk away unhindered with defendants' personal property.*

His deception continued at another level. As Gardner's case agent he was present in court along with the prosecutors, Gardner and his attorney starting on April 26. On May 25, the day of the search, the trial was still on.** Myers deliberately concealed from Gardner and his attorneys that an eviction was about to take place and that he was going to attend to conduct a search. He deliberately concealed the same facts from the district court.

There is in all this such fundamental unfairness and such blatant and outrageous bypassing of the search warrant requirement, that the fruits of the search must be suppressed.

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* Myers expressly admitted as much. He testified that Mrs. Flanagan consented to his taking over the Gardners' papers because she "said that she wished the things out of there and she didn't know what to do with them otherwise" (875).

** The Gardner jury started its deliberations on May 24. It continued on May 25 and returned its verdict on May 26.

United States v. Botsch, 364 F.2d 542, 548 (2d Cir. 1966) (but for the fact that defendant was using landlord as an unwitting accomplice, landlord's consent was insufficient. The Court stated: "courts should not be niggardly in extending the protection of constitutional rights and there is much to be said for interposing a magistrate between enforcement officers and potential defendants"); United States v. Lewis, 392 F.2d 377, 379 (2d Cir. 1968 (same); compare United States v. San Juan, 2d Cir. Nov. 10, 1976 (fundamental unfairness in Government's advancing one theory at trial and achieving conviction on another requires reversal); United States v. Archer, 486 F.2d 670, 672 (2d Cir. 1973) (fundamental unfairness of Government's setting up a federal crime by lying and perjury).

POINT II

THE DISTRICT COURT SHOULD NOT HAVE DENIED THE SUPPRESSION MOTION WITHOUT A HEARING PARTICULARLY AFTER THE DISCLOSURE OF MYERS' ILLEGAL BREAK-INS.

We have said enough to demonstrate that on the undisputed facts the district court should have granted the suppression motion. Clearly it should not have denied the motion without a hearing.

The argument centers on the fact that consent cannot excuse the absence of a warrant unless it is wholly voluntary and without coercion, explicit or implicit. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); United States v. Mapp, 476 F.2d 67 (2d Cir. 1973) (invalidate search under "submission to official authority under circumstances pregnant with coercion"). Invariably the Government's verison is that the third party openly volunteered consent. There is usually a signed form to go along with it. Often that is not what happened at all.

United States v. DiGiovanni, 2d Cir. Nov. 9, 1976 helps make the point. DiGiovanni, a bank robber, shared an apartment with his girlfriend Sonia Karakitis. The Government tried him on two bank robberies. At a suppression hearing the Agent testified that Karakitis freely gave her permission to search the apartment. Karakitis was not called by

either party. Based on the Agent's testimony the district court upheld the warrantless search (Slip Op 438-39).

The Government called Karakitis for other purposes at a second trial of DiGiovanni for another robbery. It then came out that she was sixteen, with only childlike comprehension of what had taken place; that she had just come out of the shower when the agents came, and was dressed only in a towel; that the agents had pushed the door in on her although she had screamed "don't come in"; that the agents had brought in DiGiovanni in handcuffs and then taken him out; and that she had been threatened and was nervous and afraid. Brief for Appellant Robert DiGiovanni, 76-1097, pp. 6-7. See also United States v. Botsch, 367 F.2d at 542 (Agent "had knowingly made materially false statements in applying for warrants"); United States v. Armedo-Sarmiento, 2d Cir. Oct. 28, 1976 (same; New York City police officers).

So here, the Government's story was that Mrs. Flanagan consented and that was all there was to it. But Myers had been in constant communication with Mrs. Flanagan throughout 1975 and 1976. His conduct vis a vis the district court had been devious to say the least.* His search had gone into personal papers of every sort with which he clearly had no business (A 89, 137-44). And the Brady disclosure of his illegal break-ins

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* The district court admitted that Myers should have come to him for a warrant (A 90).

had demonstrated his contempt and disrespect for rights of privacy.

Given all the circumstances a hearing was clearly in order. It made no difference that the trial was already underway (A 125). Defense counsel was prepared to stipulate that any ruling would not affect evidence previously admitted.* Nor could the problem be explained away on the ground that the basis of the earlier ruling was the landlady's consent (A 125). What Myers said and did bore on consent. His extensive participation in the eviction as well as the other facts we have recited called for further inquiry into how much of a "consent" it really was. The point was that the Government was required to disclose the Myers break-ins, it had not done so, and those disclosures, joined with the rest of the factual pattern, were relevant to the consent issue. A hearing was mandated. United States v. Mapp, supra.

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* Counsel who eventually tried the case came into the matter about a week before trial, was obliged to prepare under great pressure, and after reviewing the motion papers was at first prepared to have the court decide the suppression issue without a hearing. It became a different story as counsel learned about the Brady disclosure and that Myers' participation in the eviction was far greater than the Government had admitted.

POINT III

THE GOVERNMENT FAILED TO SHOW A CONNECTION BETWEEN BRAUNIG AND THE STATE BANK OF ALBANY SCHEME. EVIDENCE OF THAT SCHEME SHOULD HAVE BEEN EXCLUDED.

Inevitably the time had to come when the district courts would stretch this Circuit's liberal view of similar act evidence under F.R.Evidence 404(b), see, e.g., United States v. Papadakis, 510 F.2d 287 (2d Cir. 1975), to such an extent that the Government would operate with literally no restrictions whatsoever. This is that case.

The Bank of Albany fraud was Gardner's not Braunig's (A 111). She had nothing to do with it. From the stamp itself one could not tell it was fake. Even if, therefore, Braunig knew there was a stamp in the drawer (which was not shown), knew it was in fact a certification stamp (which was not shown), and knew that the stamp belonged to Gardner not someone else (which was not shown), there was no evidence that she knew it was false or that it had ever been used or in what matter.

United States v. Vosper, 493 F.2d 433 (5th Cir. 1974) is directly in point for exclusion. Vosper was tried for aiding and abetting a West Pensacola bank robbery by Lynn. His wife was the driver of the getaway car. Vosper was present in the alley when Lynn got into the car and later in the crowd which formed on the street when the police stopped the car. The Government was also permitted to show as a similar act that

Lynn had robbed a finance company in Pensacola the day before and that Vosper had been seen a block and a half from the robbery.

The Fifth Circuit held that the Pensacola robbery should not have been admitted because other than his presence there was nothing to connect Vosper to it. The Court stated (493 F.2d at 433, footnotes omitted):

> ". . . where in West Pensacola there was sufficient evidence to warrant the jury inference that he was serving as lookout in this wierdly executed robbery or to connect him with it in a meaningful way, in Pensacola there is little, save his presence (and Lynn as the robber thereto), to show that he had any responsibility for or participation in the Pensacola incident and the dangers of prejudice from this line of questioning outweighed the value of the admission of such evidence. The fact that it was a robbery of a savings and loan office by the same robber (Lynn) and with no other action by Vosper--save being in the general vicinity--created the hazard of prejudice not only that Vosper was a law breaker, but that he ran with other such law breakers. . ."

In truth the district court here knew the connection between Braunig and the stamp was missing, just as the connection of Vosper to the earlier robbery was missing. It decided to let the evidence in anyway on the theory that the jury could reject it if there was no connection. This was error. Admissibility of similar crimes is a threshold burden for the Government. The jury may not supply the connection predicate which the Government has left unfulfilled. United States v. Broadway, 477 F.2d 991 (5th Cir. 1973); United States v. Vosper, supra.

POINT IV

THE EVIDENCE WHICH RESULTED FROM THE SEARCH AND THE BANK OF ALBANY SIMILAR ACT PREJUDICED DEFENDANT.

In view of the Prosecutor's obvious reliance on the apartment search evidence (including the Bank of Albany material), we hope the Government will not argue that the errors we discussed above were harmless. We therefore touch only briefly on the point.

The Government introduced into evidence the following material seized from the apartment:

(1) Various checkbooks of the Toronto Branch of Metro Trust Company (GX 450, 453, 454; Tr. 855). The forged check which was the subject of Count 5 of the indictment was from that Bank (p. 3 supra).

(2) A checkbook and bankbook from the Montreal branch of Metro Trust Co. (GX 451, 452; Tr. 855). The forged check which was the subject of Count 6 of the indictment was from that bank (p. 3 supra).

(3) A master charge card for "S. Michael Gardner" (GX 458; Tr. 856); bank account records in the names of "Michael and Susan Gardner", and "S.M. Gardner" (GX 490, 478; Tr. 861); and records for a "new S.M. Gardner account" at Banco de Ponce (GX 484; Tr. 871). These proved the fictitious name count (p. 4 supra) and the alleged perjury about it.

(4) A copy of the Government's bill of particulars in this case with Braunig's handwritten statement next to the specifications of the perjury counts: "There was no perjurious intent except possibly re telephone and mail (name change) and that was evasion, not perjury" (GX 499; Tr. 866). "That" according to the assistant, "was highly probative" of Braunig's guilt on the perjury count (p. 5 supra) and the fictitious name count.

(5) Checks drawn on various banks in Canada and Canadian airline tickets and schedules (GX 461-67; Tr. 857-58). The Government had introduced evidence of the Canadian check kiting scheme for which Braunig was arrested in Montreal, as a similar act. This part of the seizure buttressed that.

(6) False Canadian money orders as well as an eviction notice from Mrs. Flanagan with the notation that $3,500 in money orders had been received to stay the eviction (GX 471-72, 523; Tr. 859). Braunig thus was shown to have used false instruments to pay her landlady.

(7) The material on the Bank of Albany scheme, to wit the certification stamp and pad and the Eric Thomas Bank of Albany checkbook (GX 455, 456A, B; Tr. 868A).

(8) Last but certainly not least two notes from Braunig to Gardner. One stated that she had prevailed upon some "poor unsuspecting bank officer" to cash a check "after several attempts at other banks" (GX 543, A 127), akin to the Barclays Bank proof. The other expressed her total love and devotion to Gardner, referring repeatedly to their "partnership" (e.g., "You have done me the supreme honor of making me your true partner in every sense of the word") and concluding" "How we have now become 'partners-in-crime' and learned to enjoy it" (GX 531, A 126).

The main issue in the case was intent. Maybe Gardner forged the Metro Trust checks (showing that he had Metro Trust checkbooks in the apartment helped on that), but that did not mean Braunig knew they were forged when she had Barclays take them for deposit rather than collection. Maybe Braunig used the name Susan Gardner or S.M. Gardner, but there was plenty of evidence that she loved Gardner and used the name in fantasizing that she was his wife (e.g. GX 531), not to defraud department stores. Maybe Braunig made inaccurate statements before the grand jury, but that did not mean she intended to lie to it and mislead it, especially since neutral witnesses for the defense confirmed portions of the story the Government said were false.

The Assistant, on summation, was certainly not going to let the jury forget the apartment search and Bank of Albany in its consideration of these issues. At A 127, in discussing Barclays Bank, he drew on Braunig's remarks about the "poor unsuspecting bank officer". At A 128, to refute a contention about the relevance of Barclays' error in taking the checks for deposit rather than collection, he cited the "forged certified checks on the State Bank of Albany that were forged with the very certification stamp. . . that was found in Miss Braunig's desk drawer." At 130-32, discussing intent, he pointed to evidence of the Canadian scheme found in her desk, the Metro Trust checkbooks used for the Barclays forgeries, and the certification stamp and the Eric Thomas forgeries. At A 133, he stated that if certain records seized in Braunig's office weren't "revealing enough, you need only look at the evidence which was seized from Miss Braunig's apartment to gain further insight into Miss Braunig's frauds." He then reviewed all the seized items, stressing her handwritten note about "evasion not perjury" on the bill of particulars and dwelling on her statement to Gardner (A 126) that they were now "partners-in-crime." In that, he said, "clearly rings out a message" (A 135). It is a "clear and succinct admission" of guilt (A 135). In the face of the court's charge that "Admissions by a defendant . . . constitute weighty evidence against the defendant. . . You are entitled to give great weight to such evidence" (A 57), Braunig hardly had a chance.

If the errors here were not prejudicial it is hard to imagine what is. United States v. Durant, 2d Cir. Nov. 24, 1976.

POINT V

THE DISTRICT COURT ERRED IN FAILING TO DISMISS THE BARCLAY BANK COUNTS BECAUSE THE CRIMES ALLEGED DID NOT FALL WITHIN THE MAIL FRAUD STATUTE.

CONCLUSION

This Court should reverse the conviction below and order a new trial at which the Government will not be able to introduce the evidence seized in the apartment search or the Bank of Albany fraud. In addition Counts 5 and 6 should be dismissed because they do not state a violation of the mail fraud statute.

Respectfully submitted,

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